

Letter of Findings: 04-20130256 and 04-20130257
Sales and Use Tax
For the Years 2010 and 2011

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ISSUE

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-7-3; IC § 6-2.5-7-5; IC § 6-8.1-3-12; IC § 6-8.1-5-1; IC § 6-8.1-5-4; [45 IAC 2.2-7-3](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012).

Taxpayer protests the assessment of sales tax on sales of gasoline at its gas stations.

STATEMENT OF FACTS

Taxpayer operates two gas stations/convenience stores ("Location One" and "Location Two") in Indiana. In 2012, the Indiana Department of Revenue ("Department") audited both locations.

Taxpayer only provided some documents concerning Location One. Upon reviewing Taxpayer's documents, the audit determined that Taxpayer failed to properly collect sales tax on its inside convenience store goods and gas sales at Location One. Based on the best information available at the time of the audit, the Department proceeded to impose additional sales tax. The audit also allowed Taxpayer the prepaid sales tax credit ("prepaid credit") it paid to its fuel supplier, a fuel distributor. For Location Two, in the absence of Taxpayer's records, the audit used the Location One's audit results to estimate the additional sales tax liability. However, Taxpayer did not provide any fuel purchase invoices to show the amount of the prepaid credit. As a result, the audit was not able to consider the amount allowable for deduction, which would have reduced the assessment of Location Two.

Taxpayer only protests the assessment on the sales of gasoline at both locations, claiming that it is not responsible for collecting the sales tax. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition.

DISCUSSION

The Department's audit imposed additional sales tax on the ground that Taxpayer failed to remit sales tax it collected on the gasoline/fuel it sold. Taxpayer, to the contrary, claimed that it did not have any obligation to collect and remit sales tax on the sales of gasoline.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012).

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-4-1, in pertinent part, states:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

- (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.

- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:

- (1) the property is transferred in the same form as when it was acquired;
 - (2) the property is transferred alone or in conjunction with other property or services; or
 - (3) the property is transferred conditionally or otherwise.

IC § 6-2.5-7-3 provides:

- (a) With respect to **the sale of gasoline** which is dispensed **from a metered pump**, a retail merchant shall **collect**, for each unit of gasoline sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent (\$0.001), of:

- (1) the price per unit before the addition of state and federal taxes; multiplied by
 - (2) seven percent (7 [percent]).

The retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#).

(b) With respect to the sale of special fuel or kerosene which is dispensed from a metered pump, unless the purchaser provides an exemption certificate in accordance with [IC 6-2.5-8-8](#), a retail merchant shall collect, for each unit of special fuel or kerosene sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent (\$0.001), of:

- (1) the price per unit before the addition of state and federal taxes; multiplied by
- (2) seven percent (7 [percent]).

Unless the exemption certificate is provided, the retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#). (**Emphasis added**).

[45 IAC 2.2-7-3](#) further explains:

The retail merchant selling gasoline which is dispensed from a metered pump must collect the state gross retail tax prescribed in Regulation 6-2.5-7-3(010) [[45 IAC 2.2-7-2](#)] even if the transaction is exempt from taxation under [IC 6-2.5-5-5](#) [Repealed by P.L.61-1980, SECTION 15.].

IC § 6-2.5-7-5 states:

(a) Each retail merchant who dispenses gasoline or special fuel from a metered pump shall, in the manner prescribed in [IC 6-2.5-6](#), report to the department the following information:

- (1) The total number of gallons of gasoline sold from a metered pump during the period covered by the report.
 - (2) The total amount of money received from the sale of gasoline described in subdivision (1) during the period covered by the report.
 - (3) That portion of the amount described in subdivision (2) which represents state and federal taxes imposed under this article, [IC 6-6-1.1](#), or Section 4081 of the Internal Revenue Code.
 - (4) The total number of gallons of special fuel sold from a metered pump during the period covered by the report.
 - (5) The total amount of money received from the sale of special fuel during the period covered by the report.
 - (6) That portion of the amount described in subdivision (5) that represents state and federal taxes imposed under this article, [IC 6-6-2.5](#), or Section 4041 of the Internal Revenue Code.
 - (7) The total number of gallons of E85 sold from a metered pump during the period covered by the report.
- (b) Concurrently with filing the report, **the retail merchant shall remit the state gross retail tax in an amount which equals six and fifty-four hundredths percent (6.54 [percent]) of the gross receipts, including state gross retail taxes** but excluding Indiana and federal gasoline and special fuel taxes, received by the retail merchant from the sale of the gasoline and special fuel that is covered by the report and on which the retail merchant was required to collect state gross retail tax. **The retail merchant shall remit that amount regardless of the amount of state gross retail tax which the merchant has actually collected under this chapter. However, the retail merchant is entitled to deduct and retain the amounts prescribed in subsection (c), [IC 6-2.5-6-10](#), and [IC 6-2.5-6-11](#).**

(c) **A retail merchant is entitled to deduct from the amount of state gross retail tax required to be remitted under subsection (b) an amount equal to:**

- (1) **the sum of the prepayment amounts made during the period covered by the retail merchant's report; minus**
- (2) the sum of prepayment amounts collected by the retail merchant, in the merchant's capacity as a qualified distributor, during the period covered by the retail merchant's report.

For purposes of this section, a prepayment of the gross retail tax is presumed to occur on the date on which it is invoiced. (Emphasis added).

Accordingly, Taxpayer, as a retail merchant selling the gasoline, is responsible for collecting and remitting the sales tax on the sales of gasoline. Taxpayer is allowed the "prepaid credit" which it pays to its fuel supplier.

During the audit, Taxpayer claimed that it was not responsible for collecting the sales tax on the sales of gasoline because it "lease[d] the pumps for commission." Taxpayer further asserted that it was not responsible for collecting the sales tax because it paid the sales tax to its fuel supplier. To support its protest, Taxpayer submitted several documents, including sample gasoline purchase invoices, a U.S. Oil Retailer Supply Agreement, a Personal Guaranty Agreement, an Electronic Funds Transfer Authorization Agreement, and a General Sales Tax Exemption Certificate (Form ST-105).

Taxpayer is mistaken. Upon review of Taxpayer's supporting documentation, first, all of above mentioned agreements Taxpayer submitted were executed on November 27, 2012. Therefore, those agreements are not relevant to this tax protest because the audit assessments addressed the 2010 and 2011 tax years, not the tax years following the execution of the agreements. Even if those agreements were relevant to this tax protest, those agreements failed to substantiate Taxpayer's assertion that it "lease[d] the pumps for commission." The agreements established (1) that Taxpayer agreed to purchase fuel from U.S. Oil, (2) that the responsible officer

agreed to personally guarantee the payments, and (3) that Taxpayer's own purchases of gas are exempt. In fact, those documents clearly demonstrate that Taxpayer purchased the fuel for the purpose of reselling the fuel at its gas stations. Moreover, Taxpayer's sample invoices for the tax year 2010 demonstrate that Taxpayer paid the pre-paid sales tax to the fuel supplier. The audit also noted that Taxpayer claimed the fuel it purchased as "cost of goods sold" in its federal income tax returns. Thus, in the absence of other supporting documentation to show otherwise, Taxpayer presumably purchased the fuel and resold the fuel at its gas stations. Therefore, Taxpayer must collect and remit the sales tax to the State of Indiana.

As an alternative, Taxpayer asserted that the audit erroneously used "Average Pump Price" to compute the additional sales tax that should have been collected and remitted on the sales of the gasoline because the "Average Pump Price" was higher than the actual price. Taxpayer thus argued that the proposed assessments were overstated as a result.

The Department must respectfully disagree. IC § 6-8.1-5-4(a) provides:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. **The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks. (Emphasis added).**

IC § 6-8.1-5-1(b), in relevant part, further states "[i]f the department reasonably believes that a person has not reported the proper amount of tax due, **the department shall** make a proposed assessment of the amount of the unpaid tax **on the basis of the best information available to the department**. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest." **(Emphasis added).**

In this instance, Taxpayer not only failed to adequately maintain its books and records, but also failed to provide documentation to substantiate its above assertion. Thus, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden of proof to demonstrate that the proposed assessment is wrong.

FINDING

Taxpayer's protest is respectfully denied.

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